87-1398

Supreme Court, U.S.
FILED
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CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DALE JOHNSON

Petitioner,

-vs-

ARLIE R. HELMUS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTION PRESENTED

Should the rule of Batson v. Kentucky be extended to a civil case where prospective jurors are denied their right to sit on a jury by defendant's counsel who uses only two peremptory challenges to exclude from the jury the only two black veniremen from the panel in violation of the Equal Protection Clause of the United States Constitution?

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SUPREME COURT OF THE UNITED STATES

October Term, 1987
No. _____

DALE JOHNSON,

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ARLIE R. HELMUS,

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

OPINIONS BELOW

No written opinion was rendered by the Court of Common Pleas of Erie County, Ohio; however, the court's docket entry is reproduced below at Appendix A. Following a jury trial which occurred September 30, 1985 to October 1, 1985, Petitioner, Dale Johnson, a black, was denied recovery for injuries sustained from an automobile accident wherein he was a passenger based upon the all white jury's answer to an interrogatory indicating that Petitioner was not a passenger of the car struck by the defendant, Arlie R. Helmus, a white.

By an opinion rendered June 6, 1987, the Court of Appeals of Ohio for Erie County, Sixth District, Appendix B, affirmed the judgment of the trial court denying Petitioner any relief.

By an entry dated November 4, 1987, the Supreme Court of Ohio overruled Petitioner's motion to order the Court of Appeals of Erie County to certify its record and dismissed sua sponte Petitioner's claimed appeal as of right. Appendix C.

GROUNDS OF JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3). The Supreme Court of Ohio affirmed the trial court's denial of any relief in an entry rendered November 4, 1987. This Petition is, therefore, timely filed pursuant to Sup. Ct. R. 20.2 and 28 U.S.C. § 2102(c).

CONSTITUTIONAL PROVISION INVOLVED

FOURTEENTH AMENDMENT, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Should the rule of *Batson v. Kentucky* be extended to a civil case where prospective jurors are denied their right to sit on a jury by defendant's counsel who uses only

two peremptory challenges to exclude from the jury the only two black veniremen from the panel in violation of the Equal Protection Clause of the United States Constitution?

STATEMENT OF THE CASE

This action arose as a result of a collision between the Respondent and the Petitioner on December 21, 1983. Because the defendant was operating her vehicle at a high speed while extremely intoxicated, she negligently and recklessly collided with the vehicle in which the Petitioner was a passenger. The Respondent fled the scene of the collision and was subsequently arrested and convicted for driving while intoxicated and fleeing the scene of the accident. As a result of the collision, Petitioner suffered severe injuries, great

pain, and illnesses which required hospitalization.

The trial which was videotaped pursuant to Ohio Civil Rule 40. The trial commenced on September 30, 1985. The jury rendered its verdict in favor of Respondent on October 1, 1985. During voir dire, Respondent used only two peremptory challenges to exclude the only two black veniremen. Appendix D. The Petitioner is black. The respondent is white. Id.

The evidence established that Respondent's blood alcohol level was .184 when she was subsequently arrested. The evidence also demonstrated that Petitioner was the owner of the automobile with which Respondent collided. At trial, Respondent admitted that she crashed into plaintiff's automobile when she was in a drunken condition.

In response to a special interrogatory, the jury found that Petitioner was not a passenger in the automobile when the collision occurred.

REASONS FOR ISSUANCE OF THE WRIT

This case presents the important question of whether the Constitution allows private counsel to exercise peremptory challenges in jury selection solely on the basis of the prospective juror's race. When private counsel utilize state machinery to deny black citizens their right to participate in the jury process, they thereby exercise state power. *Shelley v. Kraemer*, 334 U.S. 1 (1947). In *Batson v. Kentucky*, 476 U.S. ---, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Court called an end to the racially discriminatory use of peremptory challenges in criminal trials. The Equal

Protection Clause demands that civil litigants also be protected from such opprobrious conduct.

In *Batson v. Kentucky*, *supra*, the Court expressly reserved the question of "whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." 476 U.S. at --- n.12, 106 S. Ct. at --- n.12, 90 L. Ed. 2d at 82. Although the racially discriminatory application of peremptory challenges by the prosecution is highly analogous to the present litigation in many ways, this case presents the distinct question of when a private litigant's utilization of state courts constitutes state action under the Equal Protection Clause of the Fourteenth Amendment. Nonetheless, although the manipulation of peremptory challenges to achieve racially discriminatory results was conducted by private counsel, the Court

has consistently held that such action must comport with the Equal Protection Clause.

In *Batson, supra*, the Court noted that racially discriminatory jury selection harms not only one or more of the litigants. Racially discriminatory use of peremptory challenges also harms the excluded jurors and society itself which loses confidence in the impartiality of the judicial system.

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

476 U.S. at ---. 106 S. Ct. at ---, 90 L. Ed. 2d at 81 (citations omitted). The Court also related its long history of protecting the jurors themselves from racial discrimination.

> As long ago as *Strauder [v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1880)], therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. 100 U.S., at 308, 25 L. Ed. 664; *see Carter v. Jury Commission of Green County*, [396 U.S. 320, 329-30, 24 L. Ed. 2d 549, 90 S. Ct. 518 (1970)]; *Neal v. Deleware*, [103 U.S. 370, 386, 26 L. Ed. 567 (1881)].

Id. Thus, the Court has long protected the right of individual veniremen to serve on the jury, free from racial discrimination

In this case, the respondent exercised only two peremptory challenges to exclude the only two black jurors from the panel. As a result, an all white jury was empaneled, while the petitioner is black. As this Court stated in *Batson*, *supra*, "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth

Amendment was designed to cure." 476 U.S. at ---, 106 S. Ct. at ---, 90 L. Ed. 2d at 80.

Although petitioner himself did not object to the racially discriminatory use of respondent's peremptory challenges during *voir dire*, this Motion addresses the rights of the black veniremen under the Equal Protection Clause. The two excluded black veniremen were unable to object to respondent's racial discrimination. Therefore, the protection of their constitutional rights cannot be made to hinge on the exercise of an objection which they had no power to make.

This case would make an excellent vehicle by which to extend the prohibition against the improper use of peremptory challenges solely for racially discriminatory reasons. Both black veniremen were removed from the jury

because of the respondent's peremptory challenges. This denied the two black jurors the right to protect their fundamental rights and liberties through participation on a jury -- the hallmark of American freedom.

Respectfully submitted,

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APPENDIX A

Order of the Common Pleas Court

(Filed October 3, 1985)

Case No. 046,049

IN THE COURT OF COMMON PLEAS
ERIE COUNTY, OHIO

DALE JOHNSON,

Plaintiff,

vs.

ARLIE R. HELMUS,

Defendant.

The within action was tried by a jury, commencing on September 30, 1985. On the 1st day of October, 1985, the jury rendered its Answers to the Interrogatories submitted to it and found that the plaintiff, Dale Johnson, was not a passenger in the car struck by the defendant, Arlie R. Helmus.

Judgment, is therefore, hereby rendered in favor of the defendant. Costs to plaintiff.

/s/ JAMES L. McCRYSTAL, Judge

APPENDIX B

Opinion of the Court of Appeals

(Filed June 6, 1987)

No. E-86-19

COURT OF APPEALS OF OHIO
Sixth District
County of Erie

DALE JOHNSON,

Plaintiff,

vs.

ARLIE R. HELMUS,

Defendant.

On Appeal from
Erie County Common Pleas Court

This matter comes on appeal from the Erie County Court of Common Pleas. The facts may be summarized as follows.

On December 21, 1983, Arlie R. Helmus, appellee, ran her automobile into the back of appellant, Dale Johnson's, automobile.

Appellee left the scene of the accident. She was subsequently arrested for leaving the scene of the accident and charged with driving while intoxicated. Her blood alcohol level was tested at a level of .184. Johnson brought suit against Helmus for injury to his neck and back allegedly incurred as a result of the collision. Portions of the videotaped trial were in conflict as to whether or not Johnson was in the car when the collision occurred. Passengers of a pick-up truck travelling closely behind Helmus and who observed the collision did not see any lights on Johnson's car upon passing it and failed to observe anyone inside Johnson's vehicle. Helmus claimed that when she ran into Johnson's automobile, it was stopped with no lights. Both Johnson and his friend Kennedy Wilkin, who was driving Johnson's car on that evening, claimed that they were

in the car when Helmus rammed into the back of it and that they were moving at approximately ten to fifteen miles per hour. When the police arrived, Johnson's car was off to the side of the road and both Johnson and Wilkin were standing outside of the car. Both declined to go to the hospital at that time. The next day, however, Johnson sought medical attention, complaining of a pain in his neck and lower back area. He was treated by his physician, prescribed pain killers, and at one point hospitalized for further tests and treatment.

Upon viewing the videotaped trial, the jury found that Johnson was not a passenger in his car when the collision occurred and ruled in favor of defendant. From this verdict, appellant appeals and sets forth the following assignments of error:

"I. *WHERE A PARTY TO A JURY TRIAL IS* BLACK AND THE OPPOSING PARTY IS WHITE, THE ATTORNEYS FOR THE WHITE PARTY MAY NOT PEREMPTORILY CHALLENGE PROSPECTIVE BLACK JURORS MERELY BECAUSE OF THEIR RACE IN ORDER TO ATTAIN AN ALL WHITE PANEL OF JURORS.

"II. IT CONSTITUTES REVERSIBLE ERROR FOR THE TRIAL COURT TO REFUSE TO CHARGE THE JURY THAT (A) DRIVING UNDER THE INFLUENCE OF ALCOHOL BEVERAGES AND (B) FLEEING THE SCENE OF AN ACCIDENT CONSTITUTE NEGLIGENCE PER SE FOR WHICH THE DEFENDANT IS LIABLE TO THE PLAINTIFF FOR ANY PROXIMATELY CAUSED DAMAGES, INCLUDING DAMAGE TO AN AUTOMOBILE.

"III. THE TRIAL COURT MAY NOT PERMIT THE INTRODUCTION OF EVIDENCE AFTER A JURY HAS RETIRED AND LONG AFTER THE EXPIRATION OF VIDEOTAPE TRIAL DATES FOR THE INTRODUCTION OF EVIDENCE.

"IV. IT IS ERROR TO PERMIT THE INTRODUCTION INTO EVIDENCE OF THE RECORD OF CONVICTION OF A WITNESS WHERE THE WITNESS HAS TESTIFIED AS TO THE COMMISSION OF THE CRIME, EVEN THOUGH THE WITNESS MAY HAVE BEEN CONFUSED AS TO THE EXACT NATURE OF THE CRIME, SINCE CREDIBILITY ONLY IS THE ISSUE.

"V. THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

"VI. THE CHALLENGE FOR CAUSE OF JURORS WHO ARE ADAMANTLY OPPOSED TO DRUNK DRIVING, WHEN SUCH OPPOSITION

IS IN COMPLETE CONFORMITY WITH THE LAW, IS ERROR SINCE, OF NECESSITY, IT SKEWERS THE ODDS IN FAVOR OF THE DRUNK DRIVER DEFENDANT BY PERMITTING THE SEATING OF ONLY THOSE JURORS WHO ARE INDIFFERENT TOWARDS ENFORCEMENT OF LAWS THAT ADMITTEDLY PROTECT SOCIETY.

"VII. WHERE THE PLAINTIFF PRESENTS UNCONTROVERTED EVIDENCE OF PROPERTY DAMAGES ATTRIBUTABLE TO THE DRUNKEN MISCONDUCT OF THE DEFENDANT THE TRIAL COURT MUST INSTRUCT THE JURY THAT IT MAY CONSIDER AND AWARD PUNITIVE DAMAGES AS AN INCIDENT TO A FINDING OF COMPENSATORY DAMAGES, NOMINAL FOR OR OTHERWISE."

In Assignment of Error No. I, appellant claims that the plaintiff was denied his right to a fair trial by a jury of his peers wherein the only two black jurors were removed from the jury by use of peremptory challenges. First, appellant failed to object at the time these peremptory challenges were made. Second, there were valid reasons for peremptorily challenging both jurors. Mr. Brown, one the challenged jurors, admitted under oath

that his wife had been represented by Kirk J. Delli Bovi, co-counsel of record on behalf of appellant. Mr. Everett, the second challenged juror, was treated by Dr. Skirball and Dr. Cuthbertson. Dr. Skirball treated Johnson for his alleged neck and back injury and his videotaped deposition was subsequently presented to the jury. For all the foregoing reasons, we find Assignment of Error no. I not well-taken.

In Assignment of Error No. II, appellant argues that the trial court erred when it failed to instruct the jury that violations of R.C. 4549.02 (failure to stop after an accident) and R.C. 4511.19 (driving while intoxicated) constitute negligence per se. We are unaware of any Ohio case which provides that violation of the foregoing statutes constitutes negligence per se. As there was no law compelling the trial judge to instruct

accordingly, we find Assignment of Error No. II not well-taken.

Assignments of Error Nos. III and IV are interrelated and will be addressed together. In both, appellant essentially argues that the trial court erred in admitting into evidence certain records of conviction.

During the cross-examination of Kennedy Wilkin, Wilkin admitted having been convicted of receiving stolen property. When asked about a second conviction, he responded as follows:

"Q Was that the only time--

"MR. MURRAY: Objection.

"Q That you've ever been convicted of or pled guilty to a felony in the state of Ohio?

Q Yeah.

"MR. MURRAY: Objection.

"Q Is it not a fact, Mr. Wilkin, that just recently you entered a plea of guilty to the charge of breaking

and entering resulting from a burglary that took place at a motel here in Sandusky in January of 1985?

"A See, that's what I'm talking about.

MR. MURRAY: Objection.

"A It was in December.

"Q Oh. Isn't it a fact--

MR. MURRAY: Objection.

"Q You just recently pled guilty to the felony of breaking and entering?

"A I didn't break in no where.

"Q Isn't it a fact that you just pled guilty . . . recently pled guilty to a felony of breaking and entering?

"A I pled guilty to receiving stolen property.

"Q You're denying that you pled guilty to the felony of breaking and entering?

"A I can't remember . . . I can't remember no breaking and entering that I pled guilty to.

"Q You cannot remember that?

"A Huh-uh.

"Q Alright, but whatever the case might be, whether it be breaking and entering or receiving stolen property, this plea of guilty stemmed from an incident that occurred at a place called the Lantern Court Motel here in Sandusky on Cleveland Street?

"A Yeaa.

"MR. KENNEALLY: Thank you, Mr. Wilkin, I have nothing further."

Even though Wilkin could not remember whether he had been convicted for breaking and entering, defense counsel failed to proffer a record of Wilkin's conviction or use it to refresh his memory. Instead, defense counsel offered the record of Wilkin's conviction into evidence after Wilkin's videotaped testimony had been completed, when both parties offered their respective exhibits into evidence. The court admitted the recorded conviction of breaking and entering into evidence.

First, we note that Civ. R. 40 permits the videotaping of testimony. The local

rule for Erie County further provides that the videotaped testimony must be completed two weeks before trial. We cannot say as an absolute that all evidence in a videotaped trial must be introduced prior to completing the videotaped portion. Given the two week time frame, this could conceivably work an undue hardship on the parties and limit the admissibility of otherwise admissible evidence.

In this case, Wilkin pled guilty to the breaking and entering charge on July 19, 1985, less than two weeks prior to the date on which his videotaped testimony was taken. An actual record of Wilkin's conviction was probably available before Wilkin's videotaped testimony, but such is not clear. It is clear that defense counsel did not have much time to acquire the record and have it on hand if and when needed for the purpose of impeaching

Wilkin's credibility pursuant to Evid. R. 609.

Although the foregoing may impose a hardship on defense counsel, however, we find that an actual record should have been referred to at the time Wilkin claimed to have no memory of his conviction in order to provide the foundation for admitting the record into evidence after the videotaped testimony had been completed.

Nonetheless, while the record at issue should not have been admitted into evidence, this does not constitute reversible error pursuant to Civ. R. 61. The court's error in admitting the recorded conviction did not substantially affect plaintiff's rights. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible. Evid. R. 609. In this case, defense

counsel made repeated references to the conviction. The only reason why defense counsel later offered proof of the conviction was because Wilkin was confused and could not remember whether he had been convicted of breaking and entering. The jury would have observed these repeated attempts, whether or not the actual record was admitted into evidence. Furthermore, there was independent valid evidence that Wilkin was convicted of a crime, albeit a separate crime. Based on the foregoing, we cannot say that the court's error so prejudiced the plaintiff to the extent of being reversible error. Assignments of Error Nos. III and IV are, therefore, found not well-taken.

In Assignment of Error No. V, appellant claims that the verdict was against the manifest weight of the evidence. It is well established that "[j]judgments

supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St. 2d 279. See, also, Seasons Coal Co. v. Cleveland (1984), 10 Ohio St. 3d 77. With this standard in mind, we next examine appellant's claim that defendant's testimony should be given no weight since she was intoxicated when the accident occurred. We find that such a credibility determination was properly left to the jury. Furthermore, even though defendant's perception may have been impaired and even though she showed a tremendous lack of responsibility in leaving the scene of the accident, this does not automatically discredit her testimony.

Appellant also argues that since it was beyond dispute that defendant caused property damage to the car, a verdict awarding no damages is against the manifest weight of the evidence. We disagree.

Appellant's entire complaint focused on collecting damages for personal injuries only. Appellant did not mention property damage in any fashion either in his statement of claim or in his prayer for relief. Although appellant did pray for "such other and further relief as may be equitable," this is simply too general to preserve recovery of property damage. Appellant further failed to amend his complaint pursuant to Civ. R. 15. Having failed to properly allege property damage or otherwise amend his complaint, a verdict awarding no damages was not against the manifest weight of the evidence.

Assignment of Error No. V is, therefore, found not well-taken.

In Assignment of Error No. VI, appellant claims that two jurors were erroneously excluded for cause based on their opposition to drunk driving. Relevant portions of the voir dire are set forth at Appendix A.

Based on our review of the relevant portions, we find that the trial court did not abuse its discretion when it dismissed both jurors. Specifically, both jurors disclosed by their answers that they could not be fair and impartial. They were dismissed for good cause pursuant to R.C. 2313.42(J) which provides as follows:

> "The following are good causes for challenge to any person called as a juror:
>
> ***
>
> "(J) That he discloses by his answers that he cannot be a fair and impartial juror or will not follow

> the law as given to him by the court."

Finding that both jurors were properly dismissed for cause, Assignment of Error No. VI is therefore not well-taken.

In Assignment of Error No. VII, appellant claims that the trial court erred in failing to instruct the jury on punitive damages. Punitive damages cannot be awarded unless and until compensatory damages are warranted. In this case, the jury was justified in awarding no compensatory damages. There was credible evidence upon which the jury could conclude that plaintiff suffered no personal injury as a result of defendant's negligence. Having further failed to properly allege property damages, an award of compensatory damages for property damage was unwarranted. Absent compensatory damages, the court did not err in failing to

instruct the jury on punitive damages. Assignment of Error No. VII is, therefore, found not well-taken.

On consideration whereof, the court finds substantial justice has been done the party complaining, and judgment of the Erie County Court of Common Pleas is affirmed. It is ordered that appellant pay the costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

/s/ PETER M. HANDWORK
Presiding Judge

/s/ JOHN J. CONNORS, JR.
Judge

/s/ ALICE ROBIE RESNICK
Judge

APPENDIX C

Entry of The Supreme Court of Ohio

(Filed November 4, 1987)

Case No. 87-1249

THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

DALE JOHNSON,

Appellant,

v.

ARLIE R. HELMUS,

Appellee.

Upon consideration of the motion for an order directing the Court of Appeals for Erie County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no

substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Murray & Murray Co., L.P.A.

/s/ THOMAS J. MOYER
Chief Justice

APPENDIX D

Affidavit in Support of Motion for New Trial

IN THE COMMON PLEAS COURT
OF ERIE COUNTY, OHIO

CASE NO. 46049

DALE JOHNSON,

Plaintiff,

-vs-

ARLIE R. HELMUS,

Defendant.

STATE OF OHIO)
) ss:
COUNTY OF ERIE)

Dale Johnson, being first duly sworn, says that he is the plaintiff in this action; that he is black; and that the defendant exercised only two (2) preemptory challenges which were for the only two black jurors of the prospective panel, Eddie Brown and Mercy Everett.

Affiant further says that he did not see plaintiff's "Exhibit A" at any time prior to the time that it was submitted into evidence long after the close of all trial testimony.

Further affiant sayeth not.

/s/ Dale Johnson

Sworn to before me and subscribed in my presence this 15th day of October, 1985.

/s/ Winona S. Agsten
Notary Public

CERTIFICATION

This is to certify that three copies of the foregoing Petition for a Writ of Certiorari were served upon the respondent in the foregoing cause, by sending same by ordinary mail, with postage prepaid, on this 26th day of January, 1988, addressed as follows:

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